

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TERRY WILLIAM NEAL,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 262686

Wayne Circuit Court

LC No. 05-001096-01

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 20 to 40 years' imprisonment for the assault with intent to commit murder conviction, and two years' imprisonment for the felony firearm conviction. We affirm.

Defendant's convictions arise out of an incident that occurred on July 21, 2001. On that date, Kamal Smith went to a barbershop with his girlfriend. A man came into the barbershop and began fighting with Smith. While the fight continued, defendant entered the barbershop, and pointed a gun at Smith. When people in the barbershop became aware of the gun, they ran out, and defendant thereafter shot Smith in the head, legs, and arm.

Defendant's first issue on appeal is whether the trial court erred by questioning the victim about a previous altercation between defendant and the victim. Defendant failed to object to the trial court's questions below, so this issue is unpreserved for appeal. *People v Grant*, 445 Mich 535, 546; 420 NW2d 123 (1994) ("As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances."). Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, and 3) the plain error affected substantial rights. *Carines*, *supra* at 763. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. The defendant bears the burden of persuasion with respect to prejudice. *Carines*, *supra* at 763. Once a defendant satisfies the three requirements, an appellate court must exercise its discretion

in deciding whether to reverse. “Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error ‘seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings. . . “ *Carines, supra* at 763-764.

A trial court may question a witness in order to clarify testimony or elicit additional relevant information. *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994); MRE 614(b). The court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). A trial court may not, however, assume the prosecutor’s role with advantages unavailable to the prosecution. *People v Davis*, 216 Mich App 47, 51; 549 NW2d 1 (1996). The test is whether the judge’s questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness’ credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant’s case. *Cheeks, supra* at 480.

After the jury submitted several questions during Smith’s testimony, the trial court asked Smith if there was any previous altercation between Smith and defendant. Smith responded that there was, and the trial court asked Smith to explain the previous altercation to the jury. Smith then testified defendant had shot him in April of 2001, thereafter clarifying that he was unsure if it was, in fact, defendant who had shot him during that altercation.

The questions in dispute were posed in a neutral manner and did not distort the evidence. There is no indication that the court’s questions were intimidating or argumentative, nor is there any indication that the questions demonstrated prejudice, unfairness, or partiality on the court’s part that might have influenced the jury. The fact that testimony elicited by a trial court’s questions may have damaged the defendant’s case does not demonstrate that the court had improperly assumed the role of surrogate prosecutor. *Davis, supra* at 51. The questions were relevant to the issue of motive and we conclude that it was not error for the trial court to ask them.

Even if the trial court’s questions were asked in error, defendant would still have the burden of showing that he was prejudiced by the error, i.e., that the error affected the outcome of the lower court proceedings. *Carines, supra* at 763. In this case, the victim’s girlfriend saw defendant pointing a gun at the victim and heard gunshots soon afterwards. The victim also testified that defendant shot him. Based on the strength of eyewitness testimony, we conclude that defendant cannot meet his burden of showing that any clear error in the trial court’s questions regarding a prior altercation prejudiced him.

Defendant also argues that the trial court erred by failing to give a limiting instruction with respect to the testimony it elicited through its questions. A party must challenge an instruction at trial to preserve the issue for appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Waiver constitutes the intentional abandonment of a known right, and a party who waives a known right cannot seek appellate review of the claimed error. *Carter, supra* at 215.

Here, defense counsel indicated satisfaction with the jury instructions. By expressly approving the instructions as given, defendant waived any challenge to them.

Defendant's second issue on appeal is whether the trial court should have been disqualified because of bias and defendant's sentence overturned because the trial court relied upon impermissible factors when imposing it. Defendant failed to preserve his challenge to the potential bias of the trial court by raising a motion for disqualification below. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995); MCR 2.003(C). Defendant also failed to preserve his claims that the trial court improperly relied upon defendant's lack of remorse and defendant's exercise of his right to a jury trial when imposing sentence by objecting at sentencing. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). These issues are therefore unpreserved for appeal and review is for plain error. *Carines, supra* at 763.

Absent actual personal bias or prejudice, a judge will not be disqualified. MCR 2.003(B)(1); *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Opinions formed by a judge on the basis of facts introduced during the course of the proceedings do not constitute bias or partiality, unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Wells, supra* at 391. Similarly, judicial remarks made during the course of the trial that are critical or hostile to a party or her case do not ordinarily support a bias or partiality challenge. *Wells, supra* at 391. Moreover, a party who challenges a judge on the basis of bias must overcome a heavy presumption of judicial impartiality. *Wells, supra* at 391.

Defendant cannot overcome that presumption of impartiality in this case. The trial court did remand defendant to jail for the duration of the trial, but nothing in that decision indicates a deep-seated antagonism toward defendant. The trial court noted that defendant had already missed a pretrial conference and the start of trial. The trial court's decision to remand defendant to jail during the short trial was well reasoned, and we conclude that defendant cannot overcome the presumption of judicial impartiality merely by showing that the trial court decided against defendant.

Defendant also argues that the trial court clearly erred when imposing defendant's sentence by penalizing defendant for asserting his right to a jury trial. A court may not consider factors that violate a defendant's constitutional rights in passing sentence. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). Among those rights is the right to a trial by jury. *Godbold, supra* at 512. In this case, the trial court did not rely on defendant's assertion of his right to a jury trial in imposing sentence. While the trial court mentioned more than once at sentencing that defendant chose a jury trial, it did not hold defendant's decision against him. Instead, the trial court noted that a jury had convicted defendant beyond a reasonable doubt in order to emphasize that the case was closed and that the trial court was thus not interested in defendant's claim of innocence or his attempt to retry the case at sentencing.

Defendant further argues that the trial court clearly erred by considering defendant's lack of remorse at sentencing. A sentencing court may consider evidence of a lack of remorse in determining an individual's potential for rehabilitation. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). Resentencing is only required if it is apparent that the trial court erroneously considered the defendant's failure to admit his guilt by taking action such as asking the defendant to admit his guilt, or offering him a lesser sentence if he did. *Spanke, supra* at 650. Defendant makes no allegations that the trial court erroneously considered the defendant's failure

to admit his guilt or offered defendant a lesser sentence if he did admit guilt. Thus, nothing in the record indicates that the trial court relied on impermissible factors, and we conclude that the trial court did not clearly err by considering defendant's lack of remorse when sentencing him.

Finally, defendant asserts he was denied the effective assistance of counsel due to trial counsel's failure to object to the trial court's questions regarding a prior bad act or request a limiting instruction on the use of that evidence. Defendant did not move for a new trial or an evidentiary hearing on this basis below. Failure to so move forecloses appellate review unless the record contains sufficient detail to support his claims, and, if so, review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To prevail on a claim for ineffective assistance of counsel, a defendant must make two showings. First, the defendant must show that counsel's performance was so deficient that, under an objective standard of reasonableness, the defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin*, *supra* at 599-600.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

We conclude that trial counsel's performance was not deficient under an objective standard of reasonableness because the decision not to object to the trial court's question was a matter of trial strategy. Prior to the April, 2001 shooting being brought up, defense counsel suggested that the victim was lying on the stand in order to punish defendant for their earlier disagreements. The evidence of the April shooting suggested that the victim had even more of a reason to lie in order to retaliate against defendant. Trial counsel also impeached the victim by getting him to admit that, contrary to his earlier testimony, he did not know if defendant was the one who shot him in April. During closing arguments, trial counsel argued that the victim claimed defendant was the shooter because the victim could not identify the real shooter and wanted to get back at defendant for something that occurred when they were neighbors. Given that only the victim identified defendant as the shooter and only the victim and his girlfriend saw defendant at the barbershop with a gun, trial counsel's strategy was reasonable. Even if the strategy did not work, this Court will not substitute its judgment for that of counsel regarding

matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Garza, supra* at 255.

Trial counsel's failure to request a limiting instruction regarding the use of the evidence of the April shooting was also a matter of trial strategy. As discussed above, trial counsel wanted the jury to consider the April shooting in order to damage the victim's credibility, and counsel's failure to request a limiting instruction could therefore properly be construed as a matter of trial strategy. Again, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. We conclude that trial counsel's decision not to request a limiting instruction was not deficient under an objective standard of reasonableness.

Even if defendant could show that trial counsel's performance was deficient, he would still have to show that the deficient performance prejudiced the defense by demonstrating that, but for counsel's error, the result of the proceeding would have been different. *Carbin, supra* at 599-600. We conclude that defendant cannot meet that burden. As previously indicated, the victim's girlfriend testified that defendant pointed a gun at the victim and that she thereafter heard gunshots. Perhaps more importantly, Smith testified that defendant shot him. This case was thus reasonably decided on the basis of the eyewitness testimony, and the absence of any evidence of the earlier incident would not have changed the outcome of the proceedings.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot